Supreme Court, U.S.
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No. 08-08-337 SEP 11 2008

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In The

Supreme Court of the United States

AZZAM AHMED,

Petitioner,

v.

STATE OF OHIO,

Respondent.

On Petition For A Writ Of Certiorari To The Ohio Court Of Appeals For The Eighth Appellate District

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Does a trial court's substantial and pervasive restriction of the defendant's cross-examination of the State's witnesses as to bias and to material issues raised by the State in direct examination violate the defendant's right of confrontation and right to present a defense?

Does a prosecutor's introduction of evidence he knows to be false violate a defendant's right to a fair trial, as protected by the Due Process Clause of the Fourteenth Amendment to the United States Constitution?

Where the prospective jurors' responses in *voir dire* indicate the number and severity of the charges against a defendant render it impossible for them to maintain a presumption of innocence for the defendant, does the failure to sever charges of the indictment deprive the defendant of his right to a fair trial, as protected by the Due Process Clause of the Fourteenth Amendment to the United States Constitution?

Does prior appellate counsel render ineffective assistance if he presents issues on appeal in a manner which may potentially affect his client's later ability to pursue relief under Federal habeas corpus?

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

TABLE OF AUTHORITIES iv

OPINIONS BELOW 1

JURISDICTION 1

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 2

A. Federal Constitutional Provisions 2

B. State Provisions 2

STATEMENT OF THE CASE 3

REASONS FOR GRANTING WRIT 7

I. A trial court's substantial and pervasive restriction of a defendant's cross-examination of the State's witnesses as to bias and to material issues raised in direct examination by the State violates the defendant's right to a fair trial, as protected by the Due Process Clause of the Fourteenth Amendment to the United States Constitution, where it denies not only the Defendant's right to confront his accusers, but also his right to present a defense, as protected by the Sixth Amendment to the United States Constitution 7

TABLE OF CONTENTS – Continued

Page

II. A prosecutor's introduction of evidence he knows to be false violates a defendant's right to a fair trial, as protected by the Due Process Clause of the Fourteenth Amendment to the United States Constitution 11

III. Whether the failure to sever charges of an indictment violates a defendant's right to due process, as protected by the Due Process Clause of the Fourteenth Amendment to the United States Constitution, where the prospective jurors' responses in *voir dire* indicate the number and severity of the charges against a defendant render it impossible for them to maintain a presumption of innocence for the defendant 13

IV. Prior appellate counsel renders ineffective assistance if he presents issues on appeal in a manner which may potentially eliminate his client's later ability to pursue relief under Federal habeas corpus 15

CONCLUSION 19

APPENDIX

Opinion of the Ohio Court of Appeals, Eighth Appellate District, January 23, 2008 .....App. 1

Journal Entry of the Ohio Supreme Court, June 18, 2008 .....App. 7

TABLE OF AUTHORITIES

Page

CASES

Baldwin v. Reese, 541 U.S. 27 (2004) 16

Banks v. Reynolds, 54 F.3d 1508 (10th Cir. 1995) 18

Chapman v. California, 386 U.S. 18 (1967) 11

Corbett v. Bordenkircher, 615 F.2d 722 (6th Cir. 1980) 15

Davis v. Alaska, 415 U.S. 308 (1974) 9

Davis v. Coyle, 475 F.3d 761 (6th Cir. 2007) 15

Daye v. Attorney Gen. of New York, 696 F.2d 186 (2d Cir. 1982) 17

Donnelly v. DeChristoforo, 416 U.S. 637 (1974) 13

In Re Oliver, 333 U.S. 257 (1948) 10

Liteky v. United States, 510 U.S. 540 (1994) 11

Picard v. Connor, 404 U.S. 270 (1971) 16

State v. Ahmed, 2005 Ohio 2999 (Ohio App. 2005), *discretionary appeal not allowed*, 107 Ohio St.3d 1424 (2005) 5

State v. Ahmed, 2007 Ohio 2639 (Ohio App. 2007), *discretionary appeal not allowed*, 115 Ohio St.3d 1474 (2007) 5

State v. Ahmed, 2008 Ohio 217 (Ohio App. 2008), *discretionary appeal not allowed*, 2008 Ohio 2823 (2008) 6

Strickland v. Washington, 466 U.S. 668 (1984) 18

TABLE OF AUTHORITIES – Continued

Page

Tumey v. Ohio, 273 U.S. 510 (1927) 11

United States ex rel. Castillo v. Fay, 350 F.2d 400 (2d Cir. 1965) 13

United States v. Lane, 474 U.S. 438 (1986) 15

Wallace v. Bell, 387 F. Supp. 2d 728 (D. Mich. 2005) 11

Washington v. Texas, 388 U.S. 14 (1967) 10

RULES, STATUTES, AND OTHER AUTHORITIES

28 U.S.C. §1257(a) 1

28 U.S.C. §2241 15

28 U.S.C. §2254(a) 16

Ohio Rule of Appellate Procedure 26(B) 2, 17

United States Constitution, Fourteenth Amendment 2, 7, 11, 13, 15

United States Constitution, Sixth Amendment 2, 7, 10, 12

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF OHIO, EIGHTH APPELLATE DISTRICT, CUYAHOGA COUNTY

Petitioner Azzam Ahmed respectfully prays that a Writ of Certiorari issue to review the decision of the Ohio Court of Appeals for the Eighth Appellate District entered on January 23, 2008.

OPINIONS BELOW

The Ohio Court of Appeals for the Eighth Appellate District announced its decision and journal entry in this case on January 23, 2008. A copy of that opinion is attached as Appendix A. The Ohio Supreme Court issued a one-page order denying discretionary review of the Court of Appeals' decision on June 18, 2008. A copy of that order is attached as Appendix B.

JURISDICTION

The Ohio Supreme Court denied discretionary review on June 18, 2008. This Court has jurisdiction pursuant to 28 U.S.C. §1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

A. Federal Constitutional Provisions

The Sixth Amendment to the United States Constitution provides:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence."

The Fourteenth Amendment to the United States Constitution provides in relevant part:

> "[N]or shall any state deprive any person of life, liberty, or property, without due process of law. . . ."

B. State Provisions

Ohio Rule of Appellate Procedure (App.R.) 26(B) provides, in relevant part:

> **"(B) Application for reopening.**
>
> "(1) A defendant in a criminal case may apply for reopening of the appeal from the judgment of conviction and sentence, based

on a claim of ineffective assistance of appellate counsel. An application for reopening shall be filed in the court of appeals where the appeal was decided within ninety days from journalization of the appellate judgment unless the applicant shows good cause for filing at a later time."

STATEMENT OF THE CASE

This case began with the widely and publicly televised arrest of the Defendant, Dr. Azzam Ahmed, on the evening of August 29, 2002, for alleged sexual misconduct with a patient. Dr. Ahmed was an obstetrician and gynecologist who had practiced in the Cleveland area for over two decades, with offices in three counties, and was the head of the OB/GYN Department at three area hospitals.

In response to a public request by the Parma Police Department, thirty-six people, out of tens of thousands of patients, called and made complaints against Dr. Ahmed, resulting in his indictment on twenty-seven counts of sexual imposition, a third-degree misdemeanor; twenty-four counts of sexual battery, a second-degree felony; and two counts of rape, a first-degree felony. With the exception of the rape counts, the charges were based on the contention that Dr. Ahmed's gynecological examinations of the complainants had crossed the line from a medical procedure to a sexual assault. Thirteen of the

complainants subsequently filed civil lawsuits against Dr. Ahmed, seeking money damages.

The case proceeded to trial on January 5, 2004. While trial lawyers know that jurors will generally respond favorably to questions about their ability to presume the defendant's innocence, regardless of their true feelings, that was not the case here; during *voir dire*, many jurors openly acknowledged that the sheer volume of the charges raised a presumption of guilt in their minds. This problem was so severe that the first prospective panel had to be discharged, and a second panel called. The trial court nonetheless refused to sever the charges.

The trial continued for five weeks. The State presented sixty-seven witnesses, and the defense presented thirty-four, most of them current patients of Dr. Ahmed, testifying to his good character. At the conclusion of the evidence, the State dismissed three counts of sexual imposition. Ultimately, the jury acquitted Dr. Ahmed of thirty of the remaining fifty counts, rendering not guilty verdicts on thirteen of the twenty-four counts of sexual imposition, and seventeen of the twenty-four counts of sexual battery. It convicted him of eleven counts of sexual imposition, seven counts of sexual battery, and two rape counts. The rape counts involved a single patient, on the theory that her capacity was diminished; while the complainant had testified for the prosecution in its case-in-chief, she returned to the stand for the defense, and recanted her testimony. The trial court then sentenced Dr. Ahmed to the maximum on each

of the felony counts and ordered them to be served consecutively, for a total of forty-five years imprisonment.

Dr. Ahmed appealed to the Court of Appeals of Ohio for the Eighth Appellate District, with much of the appeal focused on prosecutorial misconduct and trial court bias. The appellate court issued its decision on June 16, 2005, concluding that there had been prosecutorial misconduct, but that the error was harmless. The court rejected thirteen other claims of error regarding the conduct of the trial, and affirmed Dr. Ahmed's convictions. *State v. Ahmed*, 2005 Ohio 2999 (Ohio App. 2005), *discretionary appeal not allowed*, 107 Ohio St.3d 1424 (2005). The appellate court did conclude, however, that the trial court had "failed to make the necessary statutory findings and to provide its reasons supporting the imposition of maximum and consecutive sentences," vacated the sentence, and remanded the case for re-sentencing.

On May 23, 2006, the trial court resentenced Dr. Ahmed, again imposing maximum, consecutive terms totaling forty-five years in prison. Appeal was subsequently taken from that decision, and on June 11, 2007, the Eighth Appellate District affirmed the resentencing. *State v. Ahmed*, 2007 Ohio 2639 (Ohio App. 2007), *discretionary appeal not allowed*, 115 Ohio St.3d 1474 (2007).

Shortly thereafter, present appellate counsel assumed representation of Dr. Ahmed. As will be seen, while prior counsel had presented various

arguments regarding the unfairness of the trial and sentencing process to which Dr. Ahmed had been subjected, they failed to structure those arguments in a way which presented the true constitutional dimensions of the fundamental unfairness which affected every step of those proceedings. Present counsel thereupon set forth upon the task of remedying those failures.

On December 11, 2007, Dr. Ahmed filed a Motion to Reopen the appeal in the instant case, pointing out that prior counsel had failed to present the issues which arose at trial as clear violations of Dr. Ahmed's fundamental constitutional rights. On January 23, 2008, the Eighth District Court of Appeals denied the motion. *State v. Ahmed*, 2008 Ohio 217 (Ohio App. 2008). The Ohio Supreme Court denied discretionary review on June 18, 2008. *State v. Ahmed*, 2008 Ohio 2823 (2008).

This Petition for Writ of Certiorari follows.

REASONS FOR GRANTING WRIT

I. A trial court's substantial and pervasive restriction of a defendant's cross-examination of the State's witnesses as to bias and to material issues raised in direct examination by the State violates the defendant's right to a fair trial, as protected by the Due Process Clause of the Fourteenth Amendment to the United States Constitution, where it denies not only the Defendant's right to confront his accusers, but also his right to present a defense, as protected by the Sixth Amendment to the United States Constitution.

In the initial appeal, Dr. Ahmed's prior counsel listed forty-two examples of the lower court's biased evidentiary and other trial rulings. Even that lengthy recitation did not completely capture the extent of the trial court's bias, and how it deprived Dr. Ahmed of any semblance of a fair trial. In preventing Dr. Ahmed's counsel from cross-examining witnesses regarding their bias, and in precluding cross-examination even on issues raised by the State on direct examination, the trial court not only repeatedly infringed upon Dr. Ahmed's Sixth Amendment right of confrontation, but those rulings violated his Sixth Amendment right to present a defense as well.

Part of the defense strategy with respect to the claims of sexual battery and imposition was to show that the complainants were motivated by monetary gain, as evidenced by the filing of the lawsuits

seeking money damages. These attempts were consistently defeated by the trial court's rulings. Two complainants testified on direct examination that they had no monetary incentive for filing a criminal charge against Dr. Ahmed, yet the court prohibited the defense from cross-examining them regarding the civil suit they had, in reality, filed against him. Where the trial court did permit questioning about civil litigation, it allowed only the mention that a lawsuit had been filed, refusing to allow the defense to explore the complaining witnesses' bias by questioning them about the details of the allegations in the civil complaints, the amount of money they were seeking, and the circumstances surrounding their filing. At least four of the civil lawsuits for money were dismissed just prior to the start of the criminal trial. The trial court did not permit inquiry into the prosecution's involvement in those dismissals, and whether they had been prompted by the prosecution. All this occurred after the State opened the door and, over objection by the defense, inquired of its own witness whether she knew one of the lawyers sitting at the trial table with Dr. Ahmed was his "civil attorney."

The trial court's limitation on cross-examination went well beyond the issue of the civil lawsuits. The defense was not permitted to ask the complaining witnesses about statements they had made to husbands and friends after the alleged incidents, yet those individuals were permitted to testify to the contents of those conversations as corroborating

witnesses. The trial court barred the defense from cross-examining the detective in charge of the case on what he had told various complainants about what other complainants had claimed, and whether their attorneys had assisted them in preparing their statements to the police.

The trial court thus consistently prohibited the defense from cross-examination into areas which were critical to demonstrating the complaining witnesses' bias. This Court has recognized that "the exposure of a witness' motivation in testifying is a proper and important function of the constitutionally protected right of cross-examination." *Davis v. Alaska*, 415 U.S. 308, 316 (1974). The preclusion of cross-examination on these issues violated Dr. Ahmed's Sixth Amendment right of confrontation and cross-examination.

A similar pattern occurred with respect to the examination of complainant Cynthia Carrasco in both the State's and Dr. Ahmed's case. The defense argued that any sexual conduct between Ms. Carrasco and Dr. Ahmed was consensual, and that the State had pressured Ms. Carrasco against her will into testifying against the doctor. The State had argued that because of her history of mental health issues, Ms. Carrasco was so susceptible to influence that she could not validly give consent. The counter of this argument, however, is that Ms. Carrasco was also susceptible to influence by the State in bringing the prosecution. While the trial court gave free rein to the prosecution in making the former argument, it

completely precluded the defense from pursuing the latter: objections to any and all questions to Ms. Carrasco regarding her conversations with the prosecutors or the police were sustained.

This not only affected Dr. Ahmed's right of confrontation, but carried into the presentation of Ms. Carrasco's testimony when she retook the stand for the defense and recanted her allegations, thus violating Dr. Ahmed's Sixth Amendment right to present a defense. See *In Re Oliver*, 333 U.S. 257 (1948), and *Washington v. Texas*, 388 U.S. 14 (1967). This restriction by the trial court upon Dr. Ahmed's right to present a defense was not confined to Ms. Carrasco's testimony; the trial court similarly limited the defense during cross-examination of the State's witnesses, and in the direct examination during the presentation of Dr. Ahmed's case. For example, the defense was prohibited from asking the State's expert whether the testimony of certain complainants was consistent with a legitimate gynecological exam, and then prohibited the defense from asking the same question of their own expert. Yet this was the very heart of the case: whether the doctor's actions were consistent with medical procedures. Indeed, the State concluded the direct examination of virtually every complainant by asking them whether what Dr. Ahmed did was for medical or sexual purposes.

Prior appellate counsel rightfully concluded that the trial court's rulings so prejudiced the defense that it demonstrated clear bias on the part of the judge, and assigned error on that basis, although only as a

matter of state law. The appellate court overruled the assignment of error, again solely as a matter of state law, concluding that the appropriate remedy would have been for Dr. Ahmed to seek to disqualify the judge, and that only the Chief Justice of the Supreme Court possessed that power.

Dr. Ahmed submits that due process considerations compel a different result. As noted in *Wallace v. Bell*, 387 F. Supp. 2d 728, 737 (D. Mich. 2005), "the Due Process Clause of the Fourteenth Amendment requires a fair trial in a fair tribunal before a judge with no actual bias against the defendant or interest in the outcome of the case." See *Liteky v. United States*, 510 U.S. 540, 555-56 (1994). The right to be tried by an impartial tribunal is a fundamental right, *Tumey v. Ohio*, 273 U.S. 510 (1927), and its abridgment is a structural error which can never be deemed harmless. *Chapman v. California*, 386 U.S. 18, 24, fn. 8 (1967). Dr. Ahmed submits that such an error occurred here. The complete record amply demonstrates that Dr. Ahmed did not in fact have "a fair trial in a fair tribunal."

II. A prosecutor's introduction of evidence he knows to be false violates a defendant's right to a fair trial, as protected by the Due Process Clause of the Fourteenth Amendment to the United States Constitution.

As noted, the major task facing Dr. Ahmed was defending himself against the overwhelming number

of the allegations against him. Not content to pile on 53 charges, 33 of which the jury would ultimately determine had no merit or were otherwise dismissed, the prosecution asserted that Dr. Ahmed's illegal conduct was not limited to the complainants, but had been part of a pattern which had existed for over a decade. The "evidence" presented in support of this assertion was that Southwest General Hospital had suspended Dr. Ahmed's privileges because he sexually assaulted a patient there in the early 1990's.

This allegation turned out not merely to be untrue, but it soon became apparent that the State had introduced the evidence, *knowing it to be false*: three weeks before trial, the prosecutors had been informed by Southwest that Dr. Ahmed had *never* had privileges there, and medical records of the patient who claimed Dr. Ahmed had assaulted her showed that she had been treated by another doctor. Indeed, the trial court's biased rulings and violation of Dr. Ahmed's Sixth Amendment rights was again a factor here: the defense was not permitted to present the testimony of a representative of the hospital regarding her phone conversations and correspondence with the State leading up to trial, and the fact that she had personally advised the lead trial prosecutor that Dr. Ahmed had never had privileges at the hospital.

Given this advance knowledge, the appellate court acknowledged that the prosecution had engaged in misconduct, but concluded that the error was harmless. Dr. Ahmed again submits that due process considerations compel a different result. Misconduct

on the part of the prosecutor is a constitutional deprivation if it created "a situation so prejudicial to [defendant] that he was denied a fair trial within the meaning of the due process clause of the Fourteenth Amendment." *United States ex rel. Castillo v. Fay*, 350 F.2d 400, 401 (2d Cir. 1965); *Donnelly v. DeChristoforo*, 416 U.S. 637 (1974).

The prosecution's misconduct went beyond merely introducing evidence it knew to be false, but insisting that it had information which supported its allegations which information, it turned out, did not exist. Throughout the trial, the pattern was one of using all means, no matter how foul, to obtain a conviction, unquestionably rising to the level of a deprivation of Dr. Ahmed's constitutional rights.

III. Whether the failure to sever charges of an indictment violates a defendant's right to due process, as protected by the Due Process Clause of the Fourteenth Amendment to the United States Constitution, where the prospective jurors' responses in *voir dire* indicate the number and severity of the charges against a defendant render it impossible for them to maintain a presumption of innocence for the defendant.

In the initial appeal, original appellate counsel devoted three full pages of their brief to a recitation of comments from prospective jurors during *voir dire*, a number of whom ultimately served on the jury, clearly indicating that the sheer weight of the 53

charges against Dr. Ahmed effectively vitiated the presumption of innocence to which he was entitled, e.g., "[the number of charges] made me form an opinion I didn't have before," "with the number of counts against this man, there's no question [of guilt] in his case," "I can't think of anything these guys could do that could convince me he wasn't guilty," "I don't think I can deal legitimately and honestly with the presumption of innocence . . . There comes a point where there's too much goddamn smoke here." For that reason, appellate counsel asserted as error the failure of the trial court to sever the counts of the indictment, or at least to grant severance of the charges of rape, which were fundamentally different, in character and evidence, from the other charges.

The appellate court rejected this assignment of error on the grounds that Defendant's acquittal on 30 of the 50 counts remaining after dismissal demonstrated that the jury could sift through the charges and make a reliable determination of which charges had merit. Given the comments of the jurors, it is much more likely that the jury was so overwhelmed with the charges that it felt it had to convict Dr. Ahmed of something, or that the charges relating to Ms. Carrasco tainted the proceedings. The result was that the jury disregarded the presumption of innocence to which Dr. Ahmed was entitled, simply because of the number and nature of the charges against him.

While prior appellate counsel did assign misjoinder as error, they asserted only state law in those

assignments. Misjoinder and failure to sever, however, also raise a Federal constitutional issue of due process of law under the Fourteenth Amendment, *Davis v. Coyle*, 475 F.3d 761, 777 (6th Cir. 2007), and *Corbett v. Bordenkircher*, 615 F.2d 722, 724 (6th Cir. 1980), where misjoinder "results in prejudice so great as to deny a defendant his . . . right to a fair trial." *United States v. Lane*, 474 U.S. 438, 446 fn. 8 (1986).

Dr. Ahmed submits that this precise situation occurred here. The failure of the trial court to grant severance constituted a deprivation of Dr. Ahmed's right to a fair trial, as guaranteed by the Due Process Clause of the Fourteenth Amendment of the United States Constitution.

IV. Prior appellate counsel renders ineffective assistance if he presents issues on appeal in a manner which may potentially eliminate his client's later ability to pursue relief under Federal habeas corpus.

In addition to pursuing relief from a wrongful conviction through the state appellate and postconviction relief processes, a defendant may pursue a remedy through the "Great Writ" of habeas corpus. That writ, which permits a defendant to challenge the legality of his confinement, is codified in Chapter 153 of Title 28 of the United States Code, and allows a Federal court to grant relief if the defendant is "in custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. §2241.

As made clear by the remaining habeas statutes, specifically 28 U.S.C. §2254(a), such relief is available to a state prisoner *only* upon a claimed violation of the United States Constitution or a Federal statute or treaty. Subsection (b)(1)(A) of that statute also requires that a defendant have "exhausted the remedies available in the courts of the State."

The exhaustion requirement obligates a defendant not only to pursue the appropriate appeals in the state courts, but to present to the state courts the Federal constitutional claims that he believes invalidate his conviction. As this Court noted in *Picard v. Connor*, 404 U.S. 270, 274 (1971),

> "The [exhaustion] rule would serve no purpose if it could be satisfied by raising one claim in the state courts and another in the federal courts. Only if the state courts have had the first opportunity to hear the claim sought to be vindicated in a federal habeas proceeding does it make sense to speak of the exhaustion of state remedies. Accordingly, we have required a state prisoner to present the state courts with the same claim he urges upon the federal courts."

The Federal courts have also imposed upon habeas petitioners the requirement that, in order to allow the state courts the "first opportunity to hear the claim sought to be vindicated," that claim must be "fairly presented" to the state courts. As explained by this Court in *Baldwin v. Reese*, 541 U.S. 27, 29 (2004),

> "To provide the State with the necessary 'opportunity,' the prisoner must 'fairly present' his claim in each appropriate state court (including a state supreme court with powers of discretionary review), thereby alerting that court to the federal nature of the claim."

Thus, a petitioner not only "must have set forth in state court all of the essential factual allegations asserted in his federal petition," but "must have placed before the state court essentially the same legal doctrine he asserts in his federal petition." *Daye v. Attorney Gen. of New York*, 696 F.2d 186, 192 (2d Cir. 1982).

The basic issues raised in this Petition – the failure to sever charges, the preclusion of cross-examination, and the introduction of knowingly false testimony by the State – were presented to the Eighth District Court of Appeals and the Ohio Supreme Court in the initial appeal. Should Dr. Ahmed pursue his habeas remedies in Federal court, however, the State may contend that he did not present those claims in that appeal in a manner sufficient to meet the exhaustion and "fair presentation" requirements of habeas law. If that argument is successful, Dr. Ahmed's opportunity to obtain relief in habeas could be curtailed.

This is the exact purpose of Ohio App.R. 26(B): to remedy the errors of appellate counsel. Contrary to what is implied in the decision of the court below, this is not a situation where counsel waited two years before filing the application to reopen. As noted

earlier, present counsel was retained only in June of 2007, and was confronted with the task of not only familiarizing himself with the 4,751-page record of a five-week trial, but with pursuing an appeal to the Ohio Supreme Court, and rectifying the errors of previous counsel in two appellate court decisions as well. In that context, the motion to reopen clearly satisfies the "good cause" exemption from the 90-day requirement.

The standards for effective assistance of appellate counsel are the same as those for trial counsel, *Banks v. Reynolds*, 54 F.3d 1508, 1514 (10th Cir. 1995), in essence, the same as articulated in *Strickland v. Washington*, 466 U.S. 668 (1984): that counsel's performance fell below acceptable standards, and that the defendant was prejudiced thereby. Dr. Ahmed submits that the availability of the Federal habeas remedy, and the requirements for pursuing that remedy, are sufficiently well known that a failure of appellate counsel in a state appeal to frame obvious issue of Federal constitutional law in a manner which meets the "fair presentation" requirement falls below acceptable standards of appellate representation, and that the prejudice resulting from possibly foreclosing a client's ability to pursue habeas relief is self-evident.

For the above reasons, Dr. Ahmed submits that any failure of appellate counsel in the prior appeals to properly frame the issues raised in the foregoing Propositions of Law in a manner sufficient to meet the "fair presentation" requirement of Federal habeas

corpus law constitutes ineffective assistance of counsel, and warranted a reopening of the appeal.

CONCLUSION

For the foregoing reasons, Petitioner respectfully submits that this Court should grant the Petition for Certiorari.

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September 11, 2008

APPENDIX A

[Cite as *State v. Ahmed*, 2008-Ohio-217.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 84220

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

AZZAM AHMED

DEFENDANT-APPELLANT

JUDGMENT: APPLICATION DENIED

APPLICATION FOR REOPENING
MOTION NO. 403868
LOWER COURT NO. CR-437437
COMMON PLEAS COURT

RELEASE DATE: January 23, 2008

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{¶ 1} Azzam Ahmed has filed an application for reopening pursuant to App.R. 26(B). Ahmed is attempting to reopen the appellate judgment that was rendered in *State v. Ahmed,* Cuyahoga App. No. 84220, 2005-Ohio-2999, which affirmed his conviction for the offenses of rape, sexual battery, and sexual imposition, but remanded for resentencing. For the following reasons, we deny the application for reopening.

{¶ 2} App.R. 26(B)(2)(b) requires that Ahmed establish "a showing of good cause for untimely filing if the application is filed more than 90 days after journalization of the appellate judgment," which is subject to reopening. The Ohio Supreme Court, with regard to the 90-day deadline provided by App.R. 26(B)(2)(b), has established that:

{¶ 3} "We now reject Gumm's claim that those excuses gave him good cause to miss the 90-day deadline in App.R. 26(B). The rule was amended to include the 90-day deadline more than seven months before Gumm's appeal of right was decided by the court of appeals in February 1994, so the rule was firmly established then, just as it is today. Consistent enforcement of the rule's deadline by the appellate

courts in Ohio protects on the one hand the state's legitimate interest in the finality of its judgments and ensures on the other hand that any claims of ineffective assistance of appellate counsel are promptly examined and resolved.

{¶ 4} **"Ohio and other states 'may erect reasonable procedural requirements for triggering the right to an adjudication,' *Logan v. Zimmerman Brush Co.* (1982), 455 U.S. 422, 437, 102 S.Ct 1148, 71 L.Ed 2d 265, and that is what Ohio has done by creating a 90-day deadline for the filing of applications to reopen.** Gumm could have retained new attorneys after the court of appeals issued its decision in 1994, or he could have filed the application on his own. What he could not do was ignore the rule's filing deadline. * * * **The 90-day requirement in the rule is 'applicable to all appellants,' *State v. Winstead* (1996), 74 Ohio St.3d 277, 278, 658 N.E.2d 722, and Gumm offers no sound reason why he – unlike so many other Ohio criminal defendants – could not comply with that fundamental aspect of the rule."** *State v. Gumm,* 103 Ohio St.3d 162, 2004-Ohio-4755, 814 N.E.2d 861, at ¶ 7 (emphasis added). See, also, *State v. LaMar,* 102 Ohio St.3d 467, 2004-Ohio-3976, 812 N.E.2d 970; *State v. Cooey,* 73 Ohio St.3d 411, 1995-Ohio-328, 653 N.E.2d 252; *State v. Reddick,* 72 Ohio St.3d 88, 1995-Ohio-249, 647 N.E.2d 784.

{¶ 5} Herein, Ahmed is attempting to reopen the appellate judgment that was journalized on June 27, 2005. The application for reopening was not filed

until December 11, 2007, more than 90 days after journalization of the appellate judgment in *State v. Ahmed,* supra. Ahmed has failed to establish "a showing of good cause" for the untimely filing of his application for reopening. *State v. Klein* (Apr. 8, 1991), Cuyahoga App. No. 58389, reopening disallowed (Mar. 15, 1994), Motion No. 49260, affirmed (1994), 69 Ohio St.3d 1481; *State v. Trammell* (July 24, 1995), Cuyahoga App. No. 67834, reopening disallowed (Apr. 22, 1996), Motion No. 70493; *State v. Travis* (Apr. 5, 1990), Cuyahoga App. No. 56825, reopening disallowed (Nov. 2, 1994), Motion No. 51073, affirmed (1995), 72 Ohio St.3d 317. See, also, *State v. Gaston,* Cuyahoga App. No. 79626, 2007-Ohio-155; *State v. Torres,* Cuyahoga App. No. 86530, 2007-Ohio-9.

{¶ 6} In addition, we find that the doctrine of res judicata prevents this court from reopening Ahmed's appeal. The principles of res judicata may be applied to bar the further litigation of issues which were raised previously or could have been raised through an appeal. See, generally, *State v. Perry* (1967), 10 Ohio St.2d 175, 226 N.E.2d 104. Claims of ineffective assistance of appellate counsel raised in an application for reopening, may be barred by res judicata unless circumstances render the application of the doctrine unjust. *State v. Murnahan* (1992), 63 Ohio St.3d 60, 584 N.E.2d 1204; *State v. Williams* (Mar. 4, 1991), Cuyahoga App. No. 57988, reopening disallowed (Aug. 15, 1994), Motion No. 52164.

{¶ 7} Herein, Ahmed filed a notice of appeal in the Ohio Supreme Court, through counsel who did not represent him on appeal in this court. On November 23, 2005, the Ohio Supreme Court denied Ahmed leave to appeal and dismissed his appeal. See *State v. Ahmed,* 107 Ohio St.3d 1424, 2005-Ohio-6124, 837 N.E.2d 1208. Since Ahmed raised or could have raised his claim of ineffective assistance of appellate counsel, upon appeal to the Ohio Supreme Court, we find that res judicata now bars any further review of the issue. *State v. Coleman* (Feb 15, 2001), Cuyahoga App. No. 77855, reopening disallowed (Mar. 15, 2002), Motion No. 33547. It must also be noted that the five proposed assignments of error, raised by Ahmed in the present application for reopening, were previously raised and found to be without merit on appeal. We further find that the circumstances of this case do not render the application of the doctrine of res judicata unjust.

{¶ 8} Finally, we find that Ahmed has failed to establish that appellate counsel was deficient by not raising the aforesaid five proposed assignments of error in a federal constitutional context. This court, in *State v. Lopez,* (May 13, 1999), Cuyahoga App. No. 74096, reopening disallowed (May 11, 2000), Motion No. 12480, held that:

{¶ 9} "The fact that applicant's appellate counsel did not present the assignments of error as federal constitutional violations does not preclude applicant from raising these issues in a federal habeas petition and having them reviewed by a

federal court if counsel's failure to do so amounted to ineffective assistance of appellate counsel. See *White v. Schotten* (6th Cir. 2000), 201 F.3d 743. Consequently, applicant is not prejudiced.

{¶ 10} "Moreover, the **focus of this court when reviewing an application for reopening** is whether an applicant **was deprived of the effective assistance of counsel on appeal in this court.** * * * . Applicant has claimed potential prejudice in a future habeas proceeding in federal court based upon appellate counsel's performance on direct appeal, but applicant has made no argument of how counsel's performance affected his appeal in this court. Applicant **has not shown that he had a reasonable probability of success on appeal** had appellate counsel presented the assignments of error in a federal context." *State v. Lopez,* supra, at 7 (emphasis added).

{¶ 11} Since Ahmed has failed to establish prejudice, as a result of his counsel's failure to argue the proposed assignments of error in a federal context and the failure to demonstrate a reasonable probability of success on appeal, we decline to reopen Ahmed's appeal.

{¶ 12} Accordingly, the application for reopening is denied.

MARY EILEEN KILBANE, JUDGE

COLLEEN CONWAY COONEY, P.J., and
KENNETH A. ROCCO, J., CONCUR

APPENDIX B

The Supreme Court of Ohio

State of Ohio	Case No. 2008-0487
v.	ENTRY
Azzam Ahmed	(Filed Jun. 18, 2008)

Upon consideration of the jurisdictional memoranda filed in this case, the Court declines jurisdiction to hear the case and dismisses the appeal as not involving any substantial constitutional question.

(Cuyahoga County Court of Appeals; No. 84220)

/s/ Thomas J. Moyer
THOMAS J. MOYER
Chief Justice